

**STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD**

IN THE MATTER OF PROPOSED REVISIONS TO:
New Mexico's State Implementation Plan

No. EIB 16-03 (R)

**Air Quality Bureau,
Environmental Protection Division of the
New Mexico Environment Department,**

Petitioner.

STATEMENT OF REASONS AND ORDER

STATEMENT OF REASONS

1. The Clean Air Act ("CAA") requires New Mexico to adopt and submit a plan for the implementation, maintenance, and enforcement of primary and secondary national ambient air quality standards ("NAAQS") to the U.S. Environmental Protection Agency ("EPA"). 42 U.S.C. § 7410(a) (CAA § 110(a)); NMED **Exhibit 6**, pg. 1.
2. The state implementation plan ("SIP") must include an enforcement program, emission limitations, and control measures. 42 U.S.C. § 7410(a)(2)(C) (CAA § 110(a)(2)(C)).
3. EPA reviews and approves SIP submittals pursuant to 42 U.S.C. § 7410(k) (CAA § 110(k)).
4. If New Mexico fails to submit a SIP or the SIP fails to satisfy minimum criteria, EPA may promulgate a federal implementation plan or trigger a mandatory 18-month or 24-month sanctions clock pursuant to Section 179 of the CAA. 42 U.S.C. § 7410(c) (CAA § 110(c)); NMED **Exhibit 6**, pg. 11.

5. Prior to submitting a SIP revision, New Mexico must provide reasonable notice and opportunity for a public hearing. 42 U.S.C § 7410(l) (CAA § 110(l)); NMED **Exhibit 6**, pp. 12 - 13.

6. The New Mexico Environment Department (“Department”) developed and presented the proposed SIP revisions to the New Mexico Environmental Improvement Board (“Board”) for its consideration and approval in its Notice of Intent to Present Technical Testimony filed on August 19, 2016 pursuant to NMSA 1978, Sections 74-2-5 (2007) and 74-2-5.1(H) (1992). *See* NMED Notice of Intent to Present Technical Testimony.

7. On June 12, 2015, EPA issued a notice to 36 states, requiring each state to revise its SIP to comply with EPA’s new interpretation of the CAA (the “SIP Call”). NMED **Exhibit 14**, 80 Fed. Reg. 33,840 (June 12, 2015) (codified at 40 C.F.R. § 52.1620).

8. As part of the SIP Call, EPA specifically reviewed New Mexico’s affirmative defense provisions and found them to be substantially inadequate and contradictory to the CAA on the grounds that they improperly limit judicial jurisdiction. NMED **Exhibit 14**, 80 Fed. Reg. at 33,487, F.N. 12 and 13.

9. EPA determined that New Mexico’s affirmative defense provisions, 20.2.7.111 through .113 NMAC, are substantially inadequate based partly on the D.C. Circuit Court of Appeals decision in *Natural Resources Defense Council v. EPA*. (“NRDC”). NMED **Exhibit 14**, 80 Fed. Reg. 33,840, 33,845; NMED **Exhibit 6**, pg. 4. In *NRDC*, the Court reviewed, among other things, a challenge to EPA’s affirmative defense provisions in private civil suits, available when an “unavoidable” malfunction results in impermissible levels of emissions. NMED **Exhibit 13**, *NRDC*, 749 F.3d 1055, 1057 (D.C. Cir. 2014). The D.C. Circuit found that only a court can

determine if civil penalties are appropriate in private CAA suits, and thus, EPA's affirmative defenses were inappropriate. *Id.* 1063-64.

10. Subsequently, EPA reevaluated its CAA interpretation regarding affirmative defenses beyond the holding of the opinion. NMED **Exhibit 14**, 80 Fed. Reg. at 33,844. EPA construed the opinion to apply to SIPs as well as EPA's own affirmative defense provisions, though the court specifically did not address SIPs in its *NRDC* opinion. *Id.* 33,851; *see also* NMED **Exhibit 13**, *NRDC*, 749 F.3d at 1064 F.N. 2.

11. The Board promulgated the current affirmative defense provisions in 2008. NMED **Exhibit 6**, pg. 2; *See also* NMED **Exhibit 8**.

12. The New Mexico affirmative defense provisions allow affirmative defenses from civil penalties in cases of excess emissions during startup, shutdown, malfunctions, and emergencies. Permittees can claim an affirmative defense for excess emissions during start up, shutdown or malfunction, provided that the Department determines that the permittee has demonstrated that it meets the necessary criteria to claim the defense. 20.2.7.111 - .112 NMAC; NMED **Exhibit 6**, pg.5.

13. Additionally, a permittee may claim an affirmative defense from a civil penalty for excess emissions during an emergency, i.e. a situation arising from sudden and reasonably unforeseeable events beyond the control of the permittee, including acts of God, which requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation due to unavoidable increases in emissions attributable to the emergency. 20.2.7.113 NMAC. The emergency affirmative defense is available provided the Department determines that the permittee demonstrates that it meets the necessary criteria to claim an

affirmative defense. *Id.* The affirmative defense provisions provide no defense from liability or injunctive relief. 20.2.7.111 - .113 NMAC; NMED **Exhibit 6**, pg. 5.

14. The affirmative defense provisions are not an automatic exemption from enforcement, as permittees must make significant demonstrations to qualify for an affirmative defense from a civil penalty. *See Id.*

15. While all excess emissions are violations, EPA recognized that imposition of a penalty for excess emissions during sudden and unavoidable malfunctions, startups, or shutdowns caused by circumstances entirely beyond the control of the owner or operator may not be appropriate. NMED **Exhibit 8**, 74 Fed. Reg. 46909, 46912 (Sep. 14, 2009) (Approval and Promulgation of Implementation Plans; New Mexico; Excess Emissions).

16. The SIP Call's main concern is jurisdictional conflict. *See* NMED **Exhibit 14**, 80 Fed. Reg. at 33,852.

17. The deadline for response to the SIP Call is November 22, 2016. NMED **Exhibit 14**, 80 Fed. Reg. at 33848.

18. In the SIP Call, EPA provided the option for affected states to remove affirmative defenses from the SIP but leave them to apply as state only regulations, applicable to state enforcement personnel only. NMED **Exhibit 14**, 80 Fed. Reg. at 33,848; NMED **Exhibit 6**, pp. 9 - 10.

19. The Department proposal removes portions of the affirmative defense provisions from the SIP, but not from the regulations, in accordance with the EPA's direction in the SIP call. NMED **Exhibit 5**; NMED **Exhibit 6**, pp. 10 – 11.

20. By making the affirmative defense provisions "state only" in their application, New Mexico can resolve the EPA's jurisdictional concern. NMED **Exhibit 6**, pg. 11.

21. The Department proposed to denote which portions of 20.2.7 NMAC are included in the SIP through the annotations following the regulation. Pursuant to 1.24.1.7 NMAC, the annotation is not part of the rule. *Id.*
22. The notice and hearing requirements were satisfied in this SIP revision process. *See* NMED **Exhibit 6**, pp. 12 – 13; *see also* NMED **Exhibit 16**.
23. The Department's proposal received a favorable response from EPA Region VI. *See* NMED **Exhibit 15**.
24. The affirmative defense provisions do not preclude administrative or judicial enforcement actions to require corrective action by a permittee or for injunctive relief. The affirmative defense provisions apply only to the Department, and they do not preclude any person or agency, including the Department, from assessing or suing to recover civil penalties in a court of competent jurisdiction. The affirmative defense provisions are not available in any federal or third party actions pursuant to Sections 113 or 304 of the Clean Air Act and do not require a party seeking enforcement pursuant to those sections to first exhaust the administrative procedures of 20.2.7 NMAC.
25. The proposed revisions satisfy the statutory requirements of the Air Quality Control Act, NMSA 1978, Section 74-2-5(E).
26. The Board has the authority to approve these proposed revisions pursuant to NMSA 1978, Section 74-2-5(C).
27. The proposed revisions are adopted for any and all of the reasons stated above.

ORDER

By a _____ majority vote of a quorum of the Board members, the proposed SIP revisions were approved by the Board on September 9, 2016. Annotations to 20.2.7 NMAC, with any appropriate corrections of typographical errors or formatting, shall be filed with the New Mexico State Records Center, and shall be submitted as expeditiously as possible by the Department to the EPA for approval of delegation authority.

SIGNED this ____ day of September, 2016.

John Volkerding, Chair
New Mexico Environmental Improvement Board
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this **Statement of Reasons and Order** was sent via the stated methods below to the following parties on _____, 2016:

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